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No. 108, Original

In The Supreme Court
Of The United States

October Term, 1987

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defendant.

WYOMING BRIEF IN OPPOSITION TO MOTION TO AMEND PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

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STATE OF NEBRASKA,
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WYOMING BRIEF IN OPPOSITION TO MOTION TO AMEND PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

JURISDICTION

Nebraska invokes the Court's retained jurisdiction under Paragraph XIII of the 1945 Decree in *Nebraska v. Wyoming*, 325 U.S. 665, 671-72 (1945), as modified by *Nebraska v. Wyoming*, 345 U.S. 981 (1953). That Decree ("North Platte Decree") apportioned the waters of the North Platte River among Nebraska, Wyoming and Colorado for irrigation purposes. The amended petition that Nebraska seeks leave to file is for enforcement of the North Platte Decree or, in the alternative, for modification of the Decree to secure a new apportionment. Wyoming questions whether Paragraph XIII of the Decree was intended to retain jurisdiction over a claim for a new apportionment beyond the scope of the existing Decree.

QUESTIONS PRESENTED

1. Whether the claim for a new and enlarged apportionment that Nebraska seeks leave to assert presents a case or controversy that is appropriate for this Court's original jurisdiction at this time.

2. Whether amendment of Nebraska's petition to assert new claims before Wyoming's pending motion for summary

judgment on the merits of Nebraska's original claims has been decided would cause prejudice to Wyoming.

STATEMENT OF THE CASE

When this case was referred to Special Master Owen Olpin on June 22, 1987, it included Nebraska's initial petition for enforcement of the North Platte Decree (filed October 6, 1986), Wyoming's answer and counterclaims for enforcement of the Decree against Nebraska, and several motions to intervene. On September 11, 1987, Wyoming filed with the Master a motion for summary judgment with supporting affidavits and brief (copy submitted herewith as Appendix), addressing the merits of each of Nebraska's pending claims. Nebraska has not yet responded to that motion, pending the Special Master's report on the motions to intervene. Briefing of the motions to intervene was completed November 16, 1987. Nebraska's Motion to Amend Petition was filed on January 11, 1988.

Nebraska's initial petition over which the Court has accepted jurisdiction is for enforcement of the existing North Platte Decree. ("Nebraska does not seek to modify the Decree in any respect, but only to enforce it pursuant to the Court's express anticipation of the need to do so. We do not propose to litigate anything new, but simply to protect what the Court has already decided." Nebraska Reply to Wyoming Brief in Opposition to Motion for Leave to File Petition at 2.) Nebraska seeks, by that petition, to have the Court construe the existing North Platte Decree to prohibit any further depletion of the North Platte River in Wyoming as a violation of Nebraska's apportionment under the Decree. Nebraska Petition at 3; Nebraska Brief in Support of Motion for Leave to File Petition at 2. Nebraska claims that such depletions will cause it substantial "ecological and environmental injuries." Nebraska Brief in Support of Motion for Leave to File Petition at 2.

Nebraska's initial petition alleges four specific violations of

the existing North Platte Decree by Wyoming. Three of the alleged violations are existing and proposed water projects in Wyoming which have caused or would cause depletions to the North Platte; the other alleged violation is Wyoming's suit to require the United States to comply with Wyoming law requiring a permit for diversion of water from the North Platte River in Wyoming to storage in the Inland Lakes in Nebraska. Nebraska Petition at 2.

Wyoming's Answer admits the actions alleged by Nebraska, but denies that they constitute violations of the existing Decree. Wyoming's Answer and Counterclaim assert, inter alia, that the existing Decree apportions natural flow water to Nebraska only for the irrigation canals diverting at and above Tri-State Dam, the Court having expressly excluded the North Platte River below Tri-State Dam from the apportionment because "local supplies . . . even during the drought period were adequate...." *Nebraska v. Wyoming*, 325 U.S. 589, 654-55 (1945). Wyoming's Motion for Summary Judgment goes to the merits of each of the claims in Nebraska's initial petition, as well as to whether Nebraska's apportionment of natural flow under the existing North Platte Decree extends to any uses below Tri-State Dam.

The amended petition that Nebraska seeks leave to file contains two alternative claims. The first, like the pending petition, seeks enforcement of the existing Decree. Amended Petition, paras. 5 and 7. It alleges essentially the same four violations of the Decree as the pending petition on which the issues have been joined.[1] Amended Petition, para. 5. The

[1] Nebraska's original petition claims that the operation of Grayrocks Reservoir on the Laramie River violates the Decree. The amended petition claims that Wyoming's administration of water rights on the Laramie River is "inconsistent with the apportionment in the Decree and the provisions of the Endangered Species Act." Amended Petition at 3. To the extent the claims are different in substance, Wyoming is entitled to a determination of its motion for judgment on the issue raised by the original claim -- whether operation of Grayrocks Reservoir in accordance with the Grayrocks Settlement Agreement violates the Decree. Nebraska cannot avoid an adverse judgment on that issue by amending now. *See, e.g., Wales Home Remodelling Co. v. Alside Aluminum Corp.*, 443 F. Supp. 908 (E.D. Wis. 1978).

amended petition requests the Court to construe the Decree as having apportioned water to Nebraska for irrigation and other uses below Tri-State Dam "by implicitly establishing a regimen of stream flow for uses below Tri-State Dam, including critical wildlife habitat along the North Platte and Platte Rivers in Nebraska."[2] *Id.* It requests an injunction against further depletions to the North Platte by Wyoming, Colorado and the United States. Amended Petition, para. 7, and prayer for relief. Each of the foregoing claims asserted in the amended petition is at issue in the existing pleadings and would be disposed of completely by the summary judgment Wyoming has requested.

In contrast to the original petition, the amended petition claims, in the alternative, a new enlarged apportionment. If the Court does not construe the existing Decree to grant the apportionment Nebraska now claims, the amended petition requests that the Decree be modified to "protect existing critical wildlife habitat in Nebraska"[3] by enjoining Wyoming, Colorado and the United States[4] from "authorizing or sanctioning" further depletions to the North Platte. Amended Petition, para. 8, prayer for relief.

[2] Nebraska apparently relies upon the 1953 stipulated modification of the Decree providing for construction and operation of Glendo Reservoir for this assertion. The language of Paragraph XVII of the Decree cited in the amended petition (para. 3) was not intended to prohibit any future Wyoming changes in the "regimen of the natural flow" as Nebraska asserts. It instead was intended only to restrict the *operation of Glendo Reservoir* to storage of natural flow within the limits specified in the stipulation.

[3] "Critical habitat" is a term used in the Endangered Species Act, 16 U.S.C. § 1532(5) (1982), to denote an area of habitat that has been designated by the U.S. Fish and Wildlife Service as critical to the survival of particular listed species. A stretch of the Platte River in central Nebraska, in the area known as the "Big Bend" reach (between Lake McConaughy and Grand Island, *see* map in Appendix at A-1), has been designated as critical habitat for the endangered whooping crane. However, it cannot be discerned from Nebraska's amended petition whether it is using the term "critical wildlife habitat" in that sense or in a broader sense to include all areas of the Platte River that are important to migratory birds and other wildlife. Wyoming uses the term in this brief in the broader sense unless indicated otherwise.

[4] The claim for injunctive relief against the United States is also new. The amended petition does not contain the requisite jurisdictional statement showing that the United States has consented to be sued on this claim. The United States would appear to be an indispensable party to litigation of the claims in the amended petition because of its responsibilities under the Endangered Species Act (16 U.S.C. § 1536(a) (1982)) as owner and operator of large storage projects on the North Platte. In any event, a decree such as Nebraska seeks purporting to "apportion" responsibility for maintenance of flows for endangered species could have no finality unless the United States is a party. *See Arizona v. California*, 298 U.S. 558, 568-72 (1936).

In summary, both the original petition and the amended petition seek to have the existing Decree construed and enforced to prohibit further depletions affecting what Nebraska now claims as its apportionment. The issues joined by the pleadings and Wyoming's Motion for Summary Judgment on the original petition would not be mooted by the amended petition. If Wyoming's pending Motion for Summary Judgment is granted, every claim in Nebraska's amended petition would be decided, except its alternative claim for modification of the Decree to enlarge its apportionment to include additional water for wildlife habitat.

SUMMARY OF ARGUMENT

The amended petition asks this Court to be the arbiter in the first instance of a complex and technical matter concerning the potential conflict between water development for beneficial use and the instream needs of critical wildlife habitat. The water development is occurring in all three states, not just in Colorado and Wyoming as Nebraska's amended petition would lead the Court to believe. There is no real and present conflict between the states and no reason for this Court to take jurisdiction over the complex problem of environmental protection that the amended petition would raise.

Congress has established processes to insure protection of threatened and endangered species of wildlife and to insure that the impacts of water development on all wildlife habitat are considered and avoided or mitigated where appropriate. Every significant water development project must go through those processes, which involve project-by-project, site-specific environmental review and permitting. Judicial review of decisions by permitting agencies is in the federal courts.

Exercise of the Court's original jurisdiction over the amended petition at this time would preempt the adminstrative processes that will either resolve the potential conflict or more sharply focus the issues for later judicial review. It would involve the Court in an anticipated conflict that is neither a real dispute among the states nor presently ripe for judicial decision. It would cause undue prejudice to Wyoming by stalling the environmental review and permitting process on a needed municipal water project and delaying decision of the legal issues of construction and enforcement of the existing Decree that are ripe for decision now. Moreover, the amended petition on its face does not show a present threat of real injury sufficient to justify the relief requested.

Protection of critical wildlife habitat can be accomplished most effectively in the processes prescribed by Congress for that purpose. It should not be addressed in the abstract in the context of an equitable apportionment. The Court should leave for another day the resolution of any conflicts that may eventually arise between the states regarding the extent to which an upstream state must forego the beneficial consumptive use of water in favor of critical wildlife habitat far downstream in another state.

ARGUMENT

I. NEBRASKA'S CLAIM FOR A NEW AND ENLARGED APPORTIONMENT FOR INSTREAM FLOWS FOR CRITICAL WILDLIFE HABITAT IN CENTRAL NEBRASKA DOES NOT PRESENT A CASE OR CONTROVERSY BETWEEN THE STATES THAT IS APPROPRIATE FOR THIS COURT'S ORIGINAL JURISDICTION.

A. *The Court's Historic Restraint in the Exercise of Its Original Jurisdiction Requires Denial of the Motion to Amend.*

Nebraska bases its request for leave to amend on Fed. R. Civ. P. 15, which states that leave to amend should be "freely

given when justice so requires." However, in original actions, this Court has not blindly applied that rule, but has scrutinized the claims in the proposed amendment to determine whether they warrant exercise of the Court's extraordinary original jurisdiction. *Ohio v. Kentucky*, 410 U.S. 641 (1973); *California v. Nevada*, 447 U.S. 125 (1980); Sup. Ct. R. 9.2 (the Federal Rules of Civil Procedure are only a guide in original cases).

The merits of Nebraska's pending claims, which must be decided whether or not leave to amend is granted, are ready for adjudication now. Since no real conflict yet exists between Nebraska's claimed uses of water for critical wildlife habitat and proposed water projects in Wyoming, the amendment "would only serve to delay adjudication on the merits and needlessly add to the expense that the litigants must bear." *Ohio v. Kentucky*, 410 U.S. at 644. While Nebraska apparently deems it more convenient to litigate that anticipated conflict in this forum now, convenience is not a controlling criterion. *See California v. Nevada*, 447 U.S. at 133 (the Court denied leave to amend, declining to expand its original jurisdiction over ancillary title disputes among the parties because another forum was available). Moreover, Wyoming does not agree that the original jurisdiction is a more convenient forum for adjudication of the complex factual issues raised by Nebraska's new claims, nor that such use of the original jurisdiction would promote judicial economy in any way.

Nebraska fails to cite any sound reason or authority that should move this Court to take jurisdiction over the amended petition. *Utah v. United States*, 394 U.S. 89 (1969), is the only original jurisdiction case that Nebraska cites in support of its assertion that liberal amendment should be allowed in the original jurisdiction "to avoid piecemeal adjudication of interstate disputes." Nebraska Brief in Support of Motion to Amend at 3. *Utah v. United States, id.*, does not stand for that proposition. In fact, it was a case where the Court refused to expand the scope of the action over ancillary claims of applicants for intervention, forcing those applicants to seek adjudication of their claims elsewhere.

The Court often has declined to exercise its original jurisdiction, even its exclusive original jurisdiction, particularly where the issues may be resolved in another forum. *See Arizona v. New Mexico*, 425 U.S. 794, 797 (1976); *United States v. Nevada*, 412 U.S. 534, 538 (1973); *Washington v. General Motors Corp.*, 406 U.S. 109 (1972); *Illinois v. Milwaukee*, 406 U.S. 91, 93-94 (1972); *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 498-99 (1971); *Massachusetts v. Missouri*, 308 U.S. 1, 19 (1939). As is demonstrated *infra*, there are other forums that are more appropriate than this Court's original jurisdiction for resolution of the issues that would be raised by the amended petition.

Nebraska's new claim for an enlarged apportionment for critical wildlife habitat is based on the assertion that any further water depletions in Wyoming or Colorado reducing flows of the North Platte into Nebraska will "adversely affect, or eliminate existing critical wildlife habitat in Nebraska." Amended Petition, para. 8. If that assertion is true (and Wyoming notes that it is disputed even among the experts), then obviously it is equally true that any water depletions in Nebraska upstream of the habitat would have the same or greater effect.[5] It is apparent as well that the issue that Nebraska would raise is not a dispute between the states at all but simply part of the tension between water development in all three states and the need to protect critical wildlife habitat.

[5] *See* December 8, 1978, Biological Opinion of U.S. Fish and Wildlife Service on Grayrocks Dam and Reservoir Project estimating projected additional surface and groundwater depletions to the Platte River above the critical habitat due to proposed projects in Nebraska, Wyoming and Colorado at 12-16. Based on the estimates in the opinion, groundwater pumping in Nebraska would comprise 58% to 76% of total projected additional depletions to the Platte above the critical habitat by the years 2000 and 2020. *Id.* at 16. Moreover, Kingsley Dam, which forms Lake McConaughy, captures and regulates the entire flow of the North Platte River below the Wyoming/Nebraska state line and above the critical migratory bird habitat. "[I]t is physically impossible to regulate water from upstream sources (e.g., sources in Wyoming or Colorado) for uses in the Big Bend Reach without passing this water through the [Lake McConaughy] Projects and altering the Projects' current operating regimes." Nebraska Public Power District and Central Nebraska Public Power and Irrigation District Brief in Support of Joint Motion for Leave to File a Joint Complaint in Intervention at 11.

Nebraska apparently fears that its water development will be required to give way to wildlife habitat needs while Colorado's and Wyoming's would proceed without regard to wildlife habitat impacts. Nebraska Brief in Support of Motion to Amend Petition at 3. Without alleging any facts that would show that fear to be justified, Nebraska asks this Court to enjoin all new beneficial consumptive uses of water in Colorado and Wyoming.[6]

The amended petition would transform this proceeding from one to construe and enforce the existing North Platte Decree into a much more complex and technical proceeding involving the relationship between the critical wildlife habitat in central Nebraska and water uses in the entire Platte River basin upstream in the three states. That relationship involves

[6] As in the Grayrocks litigation, Nebraska's concern about protection of the critical habitat appears to be incidental to its primary objective of maximizing North Platte River flows at the state line for the benefit of future consumptive uses in Nebraska, including Lake McConaughy and the projects associated with it. The delay in permitting of Deer Creek Reservoir and other potential Wyoming projects that might result from amendment of the petition would be consistent with that objective. Again, flows at the state line can reach the critical habitat only if regulated through Lake McConaughy, the largest reservoir in the Platte River basin. Nebraska does not suggest how that would be accomplished. The Federal Energy Regulatory Commission licenses for the power projects associated with Lake McConaughy expired in 1987 and are the subject of a relicensing proceeding pending before FERC. Nebraska Public Power District and Central Nebraska Public Power and Irrigation District Brief in Support of Joint Motion for Leave to File a Joint Complaint in Intervention at 14-15. The impact of the operation of Lake McConaughy on the critical habitat will be addressed in that proceeding pursuant to the Electric Consumer Protection Act of 1986, Pub. L. 99-495, 100 Stat. 1243 (1986). That proceeding could result in new license conditions requiring modified operation of Lake McConaughy and the power projects in order to maintain flows for the critical habitat downstream. In that event, Lake McConaughy and the FERC licensed projects would directly benefit from any "apportionment" for the critical habitat that Nebraska is able to obtain by expanding its suit for enforcement of the North Platte Decree to include the critical habitat issues.

extremely complex and disputed scientific and factual issues. Trial of those issues would require many technical, factual determinations, including: the habitat needs of the various species of wildlife; the quantity and pattern of flows needed to maintain the habitat; the effect on the habitat of present and future upstream water development in the entire Platte River basin in the three states, including the operation of the federal storage projects in the North Platte basin; the availability of alternative sources of water, including groundwater; and the availability of non-flow alternatives for maintaining the habitat.

In refusing to exercise original jurisdiction over an interstate pollution case involving similarly difficult, factual issues, the Court noted "the sense of futility that has accompanied this Court's attempts to treat with the complex technical and political matters that inhere in all disputes of the kind at hand . . . ." *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 502 (1971). Litigation of such issues in the original jurisdiction simply does not make sense when other more appropriate forums offering greater opportunity for conciliation and accommodation are available. *Id.*

B. *Nebraska's Amended Petition Asks This Court to Preempt the Endangered Species Protection and Environmental Review Processes Established by Congress and to Short-Circuit Existing Opportunities for Conciliation and Accommodation.*

Congress has gone to great lengths to assure that federal agencies responsible for constructing or operating water development projects or for authorizing private or local government projects fully evaluate and address the impact of those projects on fish and wildlife habitat. Congress has also assured meaningful involvement of the states and their wildlife experts in the decision making process.

The Endangered Species Act directs the Secretary of Interior to "cooperate to the maximum extent practicable with the States" in carrying out the program authorized by that act.

16 U.S.C. § 1535(a) (1982). It commands each federal agency to carry out programs for the conservation of endangered and threatened species and to insure that *any* action *authorized funded or carried out* by that agency is not likely to jeopardize the existence of such species or adversely affect their critical habitat. 16 U.S.C. § 1536(a) (1982); *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). The act and federal regulations also prohibit any private activity (including that of a state) that would modify habitat so as to "take" any endangered species. 16 U.S.C. §§ 1532(19), 1538(a) (1) (B) (1982); 50 C.F.R. § 17.3 (1986). Finally, citizen suits are authorized to redress any violation of the act by any person or entity, including the United States. 16 U.S.C. § 1540(g) (1982).[7]

The National Environmental Policy Act ("NEPA") directs all federal agencies to give environmental amenities and values "appropriate consideration in decisionmaking." 42 U.S.C. § 4332(2) (B) (1982). It requires preparation of a detailed and scientific study of the adverse affects on the environment prior to federal permitting of any significant water development.

The Fish and Wildlife Coordination Act requires every federal water project to provide for wildlife conservation. 16 U.S.C. § 663(a) (1982). It also requires anyone who would construct or operate a water project "under Federal permit or license" to first consult with federal and state wildlife agencies "with a view to the conservation of wildlife resources by preventing loss of and damage to such [wildlife] resources ...." 16 U.S.C. § 662(a) (1982).

Any significant water development project will require a permit under § 404 of the Federal Water Pollution Control Act, 33 U.S.C. § 1344 (1982). The Army Corps of Engineers, the permitting agency, must demonstrate compliance with NEPA, the Endangered Species Act and the Fish and Wildlife Coordina-

[7] Nebraska's amended petition is not a citizen suit under 16 U.S.C. § 1540(g) (1982) because Nebraska has not brought it in the federal district court nor complied with the conditions set out in 16 U.S.C. § 1540(g) (2) (1982).

tion Act and must condition any permit to "satisfy legal requirements (including the Endangered Species Act) or to otherwise satisfy the public interest requirement." 33 C.F.R. § 325.4(a) (1987). *See Riverside Irrigation District v. Andrews*, 758 F.2d 508 (10th Cir. 1985) ("Wildcat Reservoir" in the South Platte basin in Colorado), and *Nebraska v. Rural Electrification Administration*, 12 E.R.C. 1156 (D. Neb. 1978) ("Grayrocks Reservoir" on the Laramie River in Wyoming), two cases demonstrating that a water project in the North or South Platte River basins cannot proceed until the proponent and the federal permitting agency have fully addressed the project's impacts on critical habitat of endangered species in Nebraska.

The Electric Consumer Protection Act of 1986, Pub. L. 99-495, 100 Stat. 1243 (1986), amended the Federal Power Act to require the Federal Energy Regulatory Commission, in deciding whether to issue any hydroelectric power project permit, to give "equal consideration" to "the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat)."

Nebraska cites these same statutes as the "changed conditions" that should prompt this Court to reopen the Decree to consider wildlife habitat. In reality, these statutes, without the Court's involvement, insure that no significant new water development project in Wyoming or Colorado, nor a change in operation of any existing federal project, will proceed without a full evaluation of its impacts on wildlife habitat in Nebraska. Grayrocks Reservoir and the settlement agreement that allowed its construction to proceed belie Nebraska's assertion that it has no forum other than this Court to protect wildlife habitat. Nebraska succeeded in limiting the depletions by the Grayrocks Project by persuading the federal district court in Nebraska that the federal permitting agency had failed to adequately address potential impacts of the project on the critical habitat of the endangered whooping crane. *Nebraska v. Rural Electrification Administration, id.* *See* D. Tarlock, *The Endangered Species Act and Western Water Rights*, 20 Land & Water L. Rev. 1, 20-21 (1985) ("[the Grayrocks] litigation arose when

Nebraska discovered that downstream irrigators on the Platte River could be better protected under the wing of the endangered whooping crane than by litigating the allocation of the river under . . . the doctrine of equitable apportionment").

Wyoming recognizes that in the Platte River basin there is tension between water development and the need to protect critical wildlife habitat. However, as previously discussed, it involves water development in each of the three states and is not at this time a real controversy between the states. Wyoming believes the matter can be addressed more effectively through the mechanisms established by Congress and/or through cooperative efforts among the various interests than through litigation in this Court's original jurisdiction.

Such a cooperative effort, known as the "Platte River Management Joint Study," is already underway. It includes representatives from the federal government, the state governments of Nebraska, Wyoming and Colorado, the three states' water users associations and various environmental organizations, including the National Audubon Society and the Platte River Whooping Crane Critical Habitat Maintenance Trust, who have sought intervention in this case. The following statement of purpose was adopted by the Coordinating Committee of the study at its March 12, 1985, meeting:

> The purpose of the parties involved in Phase I of the Platte River Management Joint Study is to cooperate in discussions seeking ways to develop and implement recovery plans and programs which will enable Federal agency actions associated with water project development and depletions in the Platte River Basin to proceed in compliance with the Endangered Species Act while avoiding conflicts between the Endangered Species Act and state water rights systems and the use of water apportioned to a state pursuant to the compact and decrees concerning the waters of the Platte River and its tributaries.

Letter from Roger A. Weidelman, Joint Study Coordinator, U.S. Dept. of Interior, U.S. Bureau of Reclamation, to Warren White, Wyoming Office of State Planning Coordination, March 15, 1985.

A similar joint effort among Colorado, Wyoming, Utah and federal agencies recently resulted in an agreement to implement the "Recovery Implementation Program for Endangered Fish Species in the Upper Colorado River Basin," U.S. Dept. of Interior, Fish and Wildlife Service, Region 6, Denver, Colorado (September 29, 1987). The Upper Colorado River effort was the model for the Platte River Management Joint Study and has shown that the combination of the expertise and diverse interests drawn together in such an effort can achieve a cooperative resolution.

The Court should not use its original jurisdiction where, as here, there is no more than an anticipated dispute between the states and opportunity exists for a cooperative resolution before a real conflict develops. *See Vermont v. New York*, 417 U.S. 270, 277-78 (1974) (a water pollution case where the Court refused to use its original jurisdiction to implement a proposed consent decree because the "parties have available other and perhaps more appropriate means of reaching the results desired under the Proposed Court Decree" such as "[a]n interstate compact" or "a settlement . . . by agreement of the parties").

The ostensible purpose of Nebraska's attempt to expand this suit to include the Endangered Species Act issues is to achieve a final resolution of the perceived conflict between water development and protection of critical habitat. However, a final resolution probably cannot be achieved in this original action. The Endangered Species Act, including the citizen suits provision, 16 U.S.C. § 1540(g) (1982), presumably would continue to operate even if this Court re-apportioned the river to protect endangered species as Nebraska requests. Such reapportionment would not accomplish a final resolution because someone not a party to this action might still sue to

enforce the act to stop a project needed for full use of a state's apportionment. Moreover, any such apportionment decree would become obsolete whenever conditions regarding the Platte River endangered species change: e.g., when the Department of the Interior lists a new species, designates new critical habitat, changes an existing habitat designation or delists a species, or when new information about the habitat requirements of the species becomes available. Currently, there is no designated critical habitat on the North Platte in Colorado or Wyoming. Such a future designation might require modification of the decree.

Wyoming agrees with Nebraska that the "multi-state, federal nature of the problem" requires the participation and cooperation of the United States and the three states. Nebraska Brief in Support of Motion to Amend Petition at 3. That is precisely the reason that Congress has given federal agencies the responsibility to address wildlife habitat effects on their decisions. It is also the reason that those agencies have initiated the Joint Study. It is certainly no reason for the Court to accept Nebraska's amended petition and to thereby preempt the federal and interstate efforts that Congress has prescribed.

C. *There is No Real and Present Controversy Among the States Over the Effect on Critical Wildlife Habitat in Nebraska of the Colorado, Wyoming and United States Actions Alleged in the Amended Petition.*

This Court exercises its exclusive original jurisdiction sparingly and only where there is a real and present controversy between states that is ripe for determination. *United States v. Nevada*, 412 U.S. 534 (1973); *California v. Nevada*, 447 U.S. 125 (1980).

Again, no significant water development project can be undertaken in Wyoming, Colorado or Nebraska without an in-depth scrutiny of the effects of the given activity on critical wildlife habitat in Nebraska. Deer Creek Reservoir is an example. A final environmental impact statement has been

published. On July 20, 1987, the U.S. Fish and Wildlife Service issued its Biological Opinion in compliance with § 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1982 & Supp. 1986). It concluded that Deer Creek Reservoir is not likely to jeopardize the existence of the endangered whooping crane or other listed species or adversely modify critical habitat if certain mitigation measures are implemented. (Affidavit of Michael Purcell attached to Wyoming Motion for Summary Judgment, App. at 29). The Army Corps of Engineers is now deciding whether to issue a permit. If granted, that permit will contain conditions necessary to satisfy any legal requirements for mitigation of adverse impacts to wildlife habitat. 33 C.F.R. § 325.4(a) (1987). The ultimate effect of Deer Creek Reservoir, if any, on wildlife habitat in Nebraska will depend in part on the conditions that are contained in the permit. Until the permitting process is complete for Deer Creek Reservoir, or any future project, there is no controversy that is ripe for judicial determination.[8]

The purpose of the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). There, this Court prescribed a two-step inquiry for deciding whether an issue before a federal agency is ripe for judicial review: (1) whether the issue is more appropriate for resolution in court than before the agency (i.e., legal question or technical, factual question); (2) whether the party seeking judicial review would be unduly prejudiced if required to await the final outcome of the agency action. The new critical habitat

[8] There is reason to believe that a real conflict can be avoided. *See* U.S. General Accounting Office Report to the Subcommittee on Environmental Protection, Committee on Environment and Public Works, U.S. Senate, "Endangered Species, Limited Effect of Consultation Requirements on Western Water Projects," March, 1987, at 3, where the GAO found that potential conflicts between wildlife habitat and water development usually have been satisfactorily resolved by the federal agency.

issues raised by Nebraska's amended petition are more appropriate for agency decision in the first instance because they involve complex, technical matters, rather than purely legal questions. Furthermore, Nebraska is not prejudiced in any way by waiting until expert agencies have passed on the issue. *See Bethlehem Steel Corp. v. U.S. Environmental Protection Agency*, 536 F.2d 156, 161 (7th Cir. 1976) (court declined to undertake judicial review at a stage where it would "interfere with an ongoing administrative process").

The hypothetical conflict posed by Nebraska's amended petition need not, and should not, be decided by the courts until the federal agencies have passed on the technical issues. *See Riverside Irrigation District v. Andrews*, 758 F.2d 508, 514 (10th Cir. 1985) (court resolution of a potential conflict between the Endangered Species Act and the South Platte River Compact would be "premature" because the issue might be resolved in the permit application process). The court in *Riverside Irrigation District* also noted that "accommodation" of competing state interests in allocating water and federal interest in protecting the environment "are best reached in the individual permit process." *Id.* at 513.

Moreover, this Court has recognized that it is improper for any federal court to exercise its jurisdiction in the first instance over matters that Congress has given a federal agency responsibility to decide. *Far East Conference v. United States*, 342 U.S. 570, 574 (1952) (" in cases raising issues of fact not within the conventional expertise of judges . . . agencies created by Congress for regulating the subject matter should not be passed over"). The impacts of future water development on wildlife habitat should be addressed first by the environmental experts in the U.S. Fish and Wildlife Service and the federal permitting agencies (in consultation with state agencies as required by NEPA, the Endangered Species Act and the Fish and Wildlife Coordination Act, *supra*). Their determinations in matters within their expertise are entitled to great weight. *Jacob Siegel Co. v. Federal Trade Com'n*, 327 U.S. 608, 613-14 (1946); *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (a court should not

substitute its judgment for that of the agency as to the environmental consequences of the agency's actions). This Court will neither have the benefit of the agencies' expertise, nor be able to afford that expertise the weight it deserves, if it assumes jurisdiction over the issues in the amended petition before they are ripe.

D. *Nebraska Does Not Allege Real and Substantial Injury Sufficient to Warrant This Court's Exercise of Its Original Jurisdiction Over the Claim for Modification of the Decree.*

In the North Platte apportionment proceeding concluded in 1945, the Court considered and denied Nebraska's claim for an apportionment of water for uses below Tri-State Dam:

> We think, as we will develop later, that the record sustains the conclusion that equitable apportionment does not permit Nebraska to demand direct flow water from above Whalen for use below Tri-State.

Nebraska v. Wyoming, 325 U.S. 589, 628 (1945). Today, Nebraska again seeks an equitable apportionment for uses below Tri-State Dam -- this time primarily for critical wildlife habitat uses.

If Nebraska were seeking to apportion the North Platte River among the states for the first time, it would be required to show, by clear and convincing evidence, an imminent threat of serious injury to move this Court to exercise its equitable powers against Wyoming and Colorado. *Idaho v. Oregon*, 462 U.S. 1017 (1983); *Connecticut v. Massachusetts*, 282 U.S. 660 (1931). A showing of possible, future injury is insufficient. *Connecticut v. Massachusetts*, *id.* at 673; *New York v. Illinois*, 274 U.S. 488 (1927). Here, Nebraska should have an even greater burden to allege and show serious injury, because the new apportionment that Nebraska seeks would reverse the Court's previous determination that Nebraska has no equitable right to demand water from Wyoming for uses below Tri-State Dam. That previous

determination has been a key element of the division of North Platte River water among the states for over 40 years.

Nebraska apparently believes that it need not make the threshold showing of serious injury because the Court retained jurisdiction pursuant to Paragraph XIII of the North Platte Decree. Paragraph XIII was not intended to give the parties access carte blanche to this Court's jurisdiction to seek a new apportionment beyond the scope of the subject matter of the original Decree. The Court should look to the Special Master's Report in construing Paragraph XIII of the North Platte Decree. *Arizona v. California*, 460 U.S. 605, 624 n.17 (1983). The Special Master recommended that the Court retain jurisdiction "to amend the decree upon a showing of such change of conditions as might render the operation of the decree inequitable." Report of Special Master at 10, *Nebraska v. Wyoming*, 325 U.S. 589 (1945). The Court adopted that recommendation. *Id.* at 655. Further, it is evident from the Report of the Special Master that the principal changed condition he contemplated in proposing Paragraph XIII was the possible increase in water supply that would warrant relaxation or removal of the Decree's restrictions on Colorado's and Wyoming's irrigation uses. Report of Special Master at 10-11, *id.*

There could never be any finality or certainty regarding the rights of the three states to use water in the North Platte basin if Nebraska's interpretation of Paragraph XIII of the North Platte Decree prevails. In *Arizona v. California*, 460 U.S. 605 (1983), the Court construed a retained jurisdiction provision almost identical to that contained in Paragraph XIII of the North Platte Decree. The Court refused to reopen the Decree to hear the Indian tribes' claims for adjustment of the amount of their federal reserved water rights. The Court recognized that "certainty of rights is particularly important with respect to water rights in the western United States" and that "this Court does not reopen an adjudication in an original action to reconsider whether initial factual determinations were correctly made." *Id.* at 620, 623-24. *See also Nevada v. United States*, 463 U.S. 110, 129-30 (1983), recognizing the important

need for finality and certainty in the adjudication of water rights. For the same reasons, the Court should refuse to readjudicate, on the basis of Nebraska's amended petition, its previous determination that Nebraska has no claim under equitable apportionment to water originating in Wyoming for uses below Tri-State Dam.

Nebraska's amended petition is ambiguous. If, as Wyoming reads it, the new apportionment that Nebraska seeks by modification of the Decree is for protection of instream uses for wildlife habitat, then the issues are neither ripe nor appropriate for adjudication in this Court. If, on the other hand, Nebraska seeks such a new apportionment for other uses, its amended petition neither identifies those uses nor alleges any imminent threat of substantial injury to them. Either way, the amended petition demonstrates no basis for exercise of the Court's original jurisdiction.

II. AMENDMENT OF NEBRASKA'S PETITION BEFORE DETERMINATION OF WYOMING'S PENDING MOTION FOR SUMMARY JUDGMENT ON THE CLAIMS ASSERTED IN THE EXISTING PLEADINGS WOULD CAUSE UNDUE PREJUDICE TO WYOMING.

Even under the liberal amendment policy of Fed.R.Civ.P. 15, the Court should not grant leave to amend where prejudice will result to another party. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-31 (1971); *Foman v. Davis*, 371 U.S. 178, 182 (1962). Federal courts have recognized that the likelihood of prejudice to the other parties is much greater where a party seeks leave to amend while a summary judgment motion is pending. *Cf. Carey v. Beans*, 500 F. Supp. 580 (E.D. Pa. 1980); *Verhein v. South Bend Lathe, Inc.*, 598 F.2d 1061 (7th Cir. 1979).

Wyoming has spent three years and spent or committed to spend more than $1.3 million addressing the impacts of Deer Creek Reservoir in the Section 404 permit review process. Part of that process has included development of, and commitment

to, mitigation measures to offset the impacts of Deer Creek Reservoir on critical wildlife habitat in Nebraska. Wyoming will certainly be prejudiced if Nebraska is able to derail that process and convince this Court to substitute its judgment for that of the federal permitting agency even before that agency has reached a final decision.

Nebraska's original petition asserts that certain actions in Wyoming, particularly Deer Creek Reservoir, threaten to violate the Decree and should be enjoined. Those assertions cause great uncertainty to Wyoming in the development and use of its water resources. That uncertainty in turn is detrimental to Wyoming's economic development which, as with other arid western states, depends on the availability of adequate water supplies. *Arizona v. California*, 460 U.S. 605, 620 (1983). Wyoming and the City of Casper, the primary beneficiary of Deer Creek Reservoir, need and are entitled to an expeditious determination of Nebraska's assertion that Deer Creek Reservoir would violate the Decree. That question is ripe for determination by the Special Master on Wyoming's pending Motion for Summary Judgment.

If this Court takes jurisdiction over the amended petition, it will prolong the uncertainty, causing serious prejudice to Wyoming. The decision on Wyoming's Motion for Summary Judgment would be delayed and the environmental review process for Deer Creek Reservoir could be stalled. On the other hand, no prejudice would result to Nebraska by denying leave to amend.

CONCLUSION

For the foregoing reasons, the motion for leave to amend should be denied.

Respectfully submitted,

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